

COVERAGE OF STATE UNEMPLOYMENT COMPENSATION LAWS

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A substantial factor in the current interest in, and recent enactment of, state unemployment compensation laws is the fact that Title IX of the Social Security Act¹ has removed one of the most emphasized barriers to such laws by equalizing competitive costs between states so far as employers' contributions to unemployment compensation funds are concerned. As their name implies, unemployment compensation laws are predicated upon the theory of accumulating reserves during periods of employment, from which compensation is paid during periods of unemployment. If such reserves are to be accumulated through contributions required from employers, or from employers and employees, the employment coverage, the employer coverage and the territorial coverage of a state unemployment compensation law are important both for purposes of collecting contributions and of paying benefits to unemployed and eligible individuals. In each type of coverage, the nature of the considerations involved are distinctly different; and although the bases upon which contributions are required and benefits are payable need not be coextensive,² the desire to protect the solvency of funds from which benefits are paid will tend to cause the employment, employer and territorial coverage with respect to which contributions are required, to be coterminous with those on the basis of which benefits are payable.³

Employment coverage, the inclusion and exclusion of particular kinds of services, is almost exclusively a matter of state policy. The provisions of Title IX of the Social Security Act,⁴ however, have apparently influenced several states to adopt

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¹ Act of Aug. 14, 1935, 49 STAT. 531, §§901-910, 42 U. S. C. A. 7, §§1101-1110 (1935).

² Cf. *Head Money Cases*, 112 U. S. 80 (18); *U. S. v. Butler*, 56 Sup. Ct. 312, 317 (1936).

³ All the state unemployment compensation laws enacted prior to February 1, 1936, so provide, although individuals may be disqualified from receiving benefits based upon employment with respect to which contributions have been paid.

⁴ Section 901 of this title imposes an excise tax upon the employment of individuals; §§902 and 909 permit employers subject both to that title and to a state unemployment compensation law which has been approved by the Social Security Board under §903, to credit against 90% of such excise tax, the amount of contributions paid by them during the taxable year into the state unemployment fund or, with respect to employers paying reduced contribution rates under conditions which meet the requirements of §910, not in excess of 90% of the highest rate applicable under such state law to any employer subject thereto.

definitions of employment which coincide with that contained in that title,⁵ or which deviate from it very little.⁶

THE EMPLOYING UNIT

If a state law is applicable to employers of one or more individuals, irrespective of the period for which they are employed, problems incident to employer coverage are reduced to a minimum.⁷ But if a state law is applicable only to employers of a stated number of individuals,⁸ or to employers of a stated number of individuals for a stated period,⁹ various devices available to employers who seek to avoid coverage or to reduce their contributions must be guarded against. Those most readily available are independent contractor arrangements whereby no single employer employs the stated number of individuals essential to coverage,¹⁰ and separate incorporations whereby the same result is achieved, although unity of ownership and management is maintained.¹¹

It is clear that if enterprises, in which the stipulated number of individuals are engaged for the stipulated periods required for coverage purposes, are permitted to

⁵ See the definitions of employment in the Alabama, California and Oregon laws. (The definitions to which reference is made in this article are contained in the following sections of the respective state acts: Ala. §2; Cal., art. 2, §§5-14; D. C. §1; Mass. §1; N. Y. §502; Ore. §2; Utah, §3; Wis. §108.02.)

⁶ See the definitions of employment in the New Hampshire and District of Columbia laws. On the other hand, the Washington law excludes only services performed in the employ of religious, charitable, scientific, educational and similar non-profit organizations, and the New York law excludes, in addition, only employment as a farm laborer and of a minor child or spouse.

⁷ The District of Columbia law adopts this basis of employer coverage.

⁸ The Utah law is applicable to employers of 4 or more persons, irrespective of the period for which they are employed. Such classifications are no longer subject to question under the equal protection clause of the Fourteenth Amendment. *St. Louis Cons. Coal Co. v. Illinois*, 185 U. S. 203 (1902); *Ward & Gow v. Krinsky*, 259 U. S. 503 (1922).

⁹ The New York, New Hampshire and Washington laws cover employers of four or more persons for 13 weeks; the Oregon law, of four or more for 20 weeks; the Massachusetts, Alabama and California laws, of eight or more for 20 weeks, and the Wisconsin law, of eight or more for 18 weeks. It appears probable that the tax and credit provisions of Title IX of the Social Security Act, described in note 4, *supra*, will tend to influence those states contemplating the enactment of unemployment compensation laws to adopt the same test of employer coverage as occurs in that title, *i.e.*, employers of eight or more individuals for some portion of each of 20 different days, each day being in a different week (§907 (a)).

¹⁰ The laws of Alabama, Massachusetts, New Hampshire, New York, Oregon, Wisconsin and Washington include in the definition of the term "employer" a provision similar to the following, apparently intended to prevent such devices: "In determining whether an employer [of any person in the state] employs enough persons to be an 'employer' subject hereto, and in determining for what contributions he is liable hereunder, he shall, whenever he contracts with any contractor or subcontractor for any work which is part of his usual trade, occupation, profession, or business, be deemed to employ all persons employed by such contractor or subcontractor on such work, and he alone shall be liable for the contributions measured by wages paid to such persons for such work; except as any such contractor or subcontractor, who would in the absence of the foregoing provisions be liable to pay said contributions, accepts exclusive liability for said contributions under an agreement with such employer made pursuant to general commission rules."

¹¹ The laws of Alabama, Massachusetts, New Hampshire, New York, Washington and Wisconsin include in the definition of the term "employer" a provision similar to the following, apparently intended to prevent such devices: ". . . where any person, partnership, association, corporation . . ., either directly or through a holding company or otherwise, has a majority control or ownership of otherwise separate business enterprises employing persons in the state, all such enterprises shall be treated as a single 'employer' for the purposes of this act."

exempt themselves from such coverage or to reduce their contributions by a series of contracts with independent contractors, the policy and purposes of the law might in a large measure be nullified; for coverage purposes, it is therefore essential that employees of independent contractors who are engaged in work which is part of the usual trade, occupation, profession or business of the principal, be deemed to be employed by that principal,¹² irrespective of the purpose or effect of such independent contractor arrangement. The effect of such a provision in an unemployment compensation law is to impose upon the business or enterprise in which such employees are engaged, the economic burden of the protective measure adopted.¹³ Similar provisions in state workmen's compensation laws have been uniformly sustained.¹⁴ On the other hand, for contribution purposes, several alternatives are possible: (1) the liability of such principal for contributions with respect to the wages paid employees of such independent contractors might be absolute;¹⁵ (2) the liability of such principal for such contributions might be absolute, but accompanied by a right to indemnity therefor against such contractors;¹⁶ (3) such principal might be only the guarantor of such contributions, the contractor being primarily liable and the principal being secondarily liable in the event that such contractor is not responsible or is in default;¹⁷ or (4) such contractor might alone be liable for such

¹² The constitutionality of such a provision is not subject to challenge under the due process clause or the equal protection clause of the Fourteenth Amendment merely because the common law incidents of the independent contractor relationship are affected. *Cf. Pizitz Co. v. Yeldell*, 274 U. S. 112, 116 (1927). The rationale upon which workmen's compensation laws have been sustained by the Supreme Court, and which is equally applicable to unemployment compensation laws, does not require insistence upon a technical master-and-servant relation. *N. Y. Central R. R. v. White*, 243 U. S. 188 (1917); *Ward & Gow v. Krinsky*, *supra* note 8; *Pizitz Co. v. Yeldell*, *supra*. See Smith, *Sequel to Workmen's Compensation Acts* (1914) 27 HARV. L. REV. 235, 344.

¹³ The reason for including the employees of an independent contractor in determining the coverage and contributions of his principal are equally applicable to a similar inclusion of independent contractors engaged under the same conditions, irrespective of whether or not they have individuals in their employ. The considerations for and against such inclusion involve matters that are without the scope of this discussion. See Note (1926) 43 A. L. R. 345, §12, for a discussion of whether independent contractors, in the absence of specific provisions, are within the purview of workmen's compensation acts.

¹⁴ Under some state laws, the liability of the principal to the employees of the independent contractor is absolute, *Fox v. Fafnir Bearing Co.*, 107 Conn. 189, 193 Atl. 778 (1928); *Bradley v. Steiner*, 233 Mich. 312, 193 N. W. 897 (1923); *Cleland v. McLaurin*, 40 Idaho 371, 232 Pac. 571 (1925); *Purkable v. Greenland Oil Co.*, 122 Kan. 720, 253 Pac. 219 (1927); under others, the liability of the principal is conditioned upon the contractor's default or upon the principal's failure to require the contractor to insure his compensation liability, *Am. Steel Foundries Co. v. Industrial Board*, 284 Ill. 99, 119 N. E. 902 (1918); *I. C. v. Everett*, 108 Ohio St. 369, 140 N. E. 767 (1923); *De Witt v. State*, 108 Ohio St. 513, 141 N. E. 551 (1923); and under others, the principal is liable as a guarantor of the contractor's obligation to insure his employees, *Corbett v. Starrett Bros.*, 105 N. J. L. 228, 143 Atl. 352 (1928); *Clark v. Monarch Engineering Co.*, 248 N. Y. 107, 161 N. E. 436 (1928); *Madison Entertainment Corp. v. Kleinheinz*, 211 Wis. 459, 248 N. W. 415 (1933). See Note (1929) 58 A. L. R. 872.

¹⁵ Provisions such as that quoted in note 10, *supra*, are of this type, with the qualification that if the independent contractor is an "employer" as defined by reason of his own employment record, the principal may be relieved of liability for contributions based upon wages paid to the employees of such contractors under contractual arrangements between the principal and the contractor, made in accordance with rules of the state agency administering the law.

¹⁶ *Cf. Madison Entertainment Corp. v. Kleinheinz*, *supra* note 14.

¹⁷ *Cf. De Witt v. State*, *supra* note 14.

contributions, irrespective of whether he is subject to the law by reason of his own employment record.¹⁸

It is immaterial, under a state law which is applicable to employers of a stated number of individuals, or to employers to a stated number of individuals for a stated period, whether such individuals work at one or more places of employment.¹⁹ If a concern conducts its business through one or more branches or units, for coverage purposes such units constitute a single organization and the total number of employees engaged therein determines whether or not such concern is subject to the law. If, on the other hand, such a concern owns or controls the same units through the medium of separate corporations, unless such units are viewed together, the law affords an opportunity for evasion by separating units into separate corporations, and places a premium upon the segregation or separate incorporation of activities which are normally conducted by a single concern or as branches of a single concern.²⁰ The complexity of the problem presented by the possibilities of evasion through corporate affiliations cannot be minimized;²¹ an innumerable variety of situations may occur: one corporation may own all, the majority, or a controlling proportion of the capital stock in another or other corporations; the stock in two or more corporations may be controlled by the same interests, although the legal ownership is dispersed, the control resting solely upon contract, acquiescence, the exigencies of business, or other considerations. But as in the case of independent contractor arrangements, it would seem essential to the policy and purposes of an unemployment compensation law that the avoidance of coverage through separate incorporations be prohibited.

As a general rule, a corporation and its stockholders are deemed separate entities.²² But if a state has power to establish an unemployment compensation system, it also possesses the power to insure its efficacy by prohibiting or disregarding devices in evasion of it.²³ Reasonable measures may be adopted to prevent an avoidance of a valid tax or regulation, as a necessary adjunct to a general scheme within the

¹⁸ If employers subject to a state law may secure reduced contribution rates on the basis of their employment records, this arrangement may enable an employer to operate the seasonal or unstable portion of his enterprise through independent contractors, and thereby secure reduced rates by avoiding charges against his record for benefits paid to workers employed in that portion of the business.

¹⁹ *Ward & Gow v. Krinsky*, *supra* note 8. Provisions to this effect, which occur in the definitions of "employer" in the Alabama, California, Massachusetts, New Hampshire, New York, Oregon, Washington and Wisconsin unemployment compensation laws, appear unnecessary.

²⁰ Of course, no question occurs if each such unit employs a sufficient number of individuals for a sufficient period to be subject to the law by reason of its own employment record. But if one or more such units would not be so subject, even though all others would be covered, the reason for viewing all such units as a single organization remains. Segregation would, of course, affect the reserves available for benefits in a state adopting the employer reserve system.

²¹ See, e.g., the volume of litigation under the provisions of the Revenue Act of 1918 and its amendments, particularly §240 (b), relating to consolidated income tax returns by affiliated corporations. See Note (1930) 69 A. L. R. 1271; (1933) 85 A. L. R. 153. See, also BERLE AND MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); BONBRIGHT AND MEANS, *THE HOLDING COMPANY* (1932).

²² *Cannon Mfg. Co. v. Cudahy Co.*, 267 U. S. 333 (1925); *Klein v. Bd. of Supervisors*, 282 U. S. 19, 24 (1930).

²³ *Tyler v. U. S.*, 281 U. S. 497, 505 (1930).

legislative power.²⁴ And in considering the reasonableness of such measures, not only the final purpose of the law, but also the means of its administration, the ways it may be defeated, must be considered.²⁵ The general rule with respect to the separate identity of corporations is subject to the qualification that such separate identity may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection of public rights.²⁶ The extent to which these various doctrines will be held to permit the coverage of separately incorporated units under the same management and control will in a large measure be dependent upon the facts in the individual cases presented to the courts. Assuming that, for coverage purposes, several closely affiliated corporations are viewed as a single entity, for contribution purposes, each unit in the corporate organization should alone be liable for the contributions measured by wages paid to individuals in its employ.²⁷

TERRITORIAL COVERAGE

The territorial coverage of a state unemployment compensation law is important because of the comparatively wide territorial range in which a particular employer's workers move, irrespective of state lines, and in which an individual worker with disconnected periods of employment in several states may move. Social policy and justice to contributors require that duplication of coverage, either by permitting benefits to be collected from two or more states with respect to the same period of unemployment,²⁸ or by requiring contributions in two or more states,²⁹ based upon

²⁴ U. S. v. Lehigh Valley R. Co., 220 U. S. 257 (1911); Second Employers' Liability Cases, 223 U. S. 1 (1911).

²⁵ St. John v. New York, 201 U. S. 633 (1906); Tyler v. U. S., *supra* note 23.

²⁶ U. S. v. Lehigh Valley R. Co., 220 U. S. 257, at 272-274; Chicago, M. & St. P. Ry. Co. v. Minneapolis Civic Assoc., 247 U. S. 490, 500-501 (1918); *cf.* McCaskill Co. v. U. S., 216 U. S. 504 (1910); U. S. v. D. L. & W. R. R. Co., 238 U. S. 516 (1915); U. S. v. Reading Co., 253 U. S. 26 (1920).

²⁷ In the tax cases, it is well established that the imposition of a tax upon one person, measured by the property or income of another, constitutes an arbitrary taking of the first person's property without due process of law. Hooper v. Tax Commission, 284 U. S. 206, 78 A. L. R. 346 (1931); Schlesinger v. Wisconsin, 270 U. S. 230 (1926); Heiner v. Donnan, 285 U. S. 312 (1932). And an otherwise unconstitutional exaction cannot be justified by its necessity to prevent frauds and evasions. Hooper v. Tax Comm., *supra*; Heiner v. Donnan, *supra*. Although it may be reasonable to view all the units within a closely affiliated corporate group as a single "employer" for coverage purposes, the same reasons do not apply to requiring one such unit to pay contributions based upon wages paid by other units to individuals in their employ.

²⁸ The soundness of the social policy against double benefits assumes that the benefits payable under a state law are reasonable and adequate; as of Feb. 1, 1936, all the state laws enacted provided for compensation at the rate of 50% of the full time weekly wage. The District of Columbia law established a rate varying between 40 and 65%, depending upon the recipient's number of dependents. The Utah law establishes a maximum benefit of \$18 per week; all the other laws, a maximum of \$15. Under workmen's compensation laws, some states have permitted recovery in more than one state for the same injury, Texas Employers' Ins. Ass'n v. Price, 117 Tex. 173, 300 S. W. 667 (1927); some have required that amounts recovered in other states be deducted from their own allowance, Interstate Power Co. v. Industrial Comm., 203 Wis. 446, 234 N. W. 889 (1931); and some have refused compensation if compensation for the same injury had been received in another state, Finkley v. Saenger Tailoring Shop, 196 N. E. 536 (Ind. 1935).

²⁹ Although contributions to state unemployment compensation funds probably do not constitute "taxes," U. S. v. Butler, 56 Sup. Ct. 312, 317 (1936); State v. Postal Tel. Cable Co., 101 Wash. 630, 172 Pac. 902 (1918); *cf.* Mt. Timber Co. v. Wash., 243 U. S. 219, 240 (1917); and the dissent of

the same services, be avoided to the maximum extent practicable. On the other hand, it is probable that states enacting unemployment compensation laws will endeavor to secure the maximum coverage possible for their workers whose services are rendered both within and without the state.

The absence of any federal legislation in the field of interstate commerce, and the provisions of Section 906 of the Social Security Act eliminate problems of state interference with interstate commerce.³⁰

Coverage problems which have occurred under workmen's compensation laws present the closest analogies to those likely to occur under state unemployment compensation laws. As indicated by such cases, the territorial range of employment presents eight principal types of factual situations:

- Case 1. Employment entirely without the state, incidental to a business without the state and performed under a contract made (a) in the state or (b) without the state;³¹
- Case 2. Employment entirely without the state, localized without the state, but incidental to a business within the state and performed under a contract made (a) in the state or (b) without the state;
- Case 3. Employment having no fixed situs in any state, performed entirely without the state, but incidental to a business within the state and performed under a contract made (a) in the state or (b) without the state;
- Case 4. Employment having no fixed localization in any state, performed in part within the state, but incidental to a business without the state and performed under a contract made (a) in the state or (b) without the state;
- Case 5. Employment having no fixed localization in any state, performed in part within the state, but incidental to a business within the state and performed under a contract made (a) in the state or (b) without the state;
- Case 6. Employment having a situs without the state, but with some employment performed within the state which is incidental to or a part of the course of the employment without the state;

Brandeis, J., in *N. Y. Central R. R. Co. v. Winfield*, 244 U. S. 147, 167 (1917) (intimating that contributions to the Washington and New York workmen's compensation funds were "in the nature of a tax"), the tendency of the tax cases indicate that it is the purpose of the Supreme Court to eliminate the substantial burden of multiple exactions upon the same economic interest. See Brown, *Multiple Taxation by the States* (1935) 48 HARV. L. REV. 407. For an interesting analysis, see HARDING, *DOUBLE TAXATION OF PROPERTY AND INCOME* (1933).

³⁰ The Federal Act, §906, deprives one required under a state law to make payments into a state unemployment fund of the defense that he is engaged in interstate commerce. That such authorization by the federal government to states to extend their jurisdiction in such manner is valid, see *In re Rahrer*, 140 U. S. 545 (1890); *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U. S. 311 (1917).

³¹ It appears immaterial whether employment of this type is localized in any other state or has no fixed situs in any state; one state has advanced the theory that employment under a contract of hire made within the state has a situs therein until a different situs is acquired elsewhere. *Val Blatz Brewing Co. v. Industrial Comm.*, 201 Wis. 474, 230 N. W. 622 (1930), although the broad language in this case is questioned in a later decision. See *Interstate Power Co. v. Industrial Comm.*, *supra* note 28.

- Case 7. Employment having a situs within the state but with some employment without the state which is incidental to or a part of the course of the employment within the state; and
- Case 8. Employment entirely within the state.³²

Like workmen's compensation laws³³ unemployment compensation laws operate upon an employer-employee relationship; that relationship may be created by a contract, but the rights and liabilities which the law creates are neither contractual nor tortious in their nature, and arise out of the law itself rather than out of a contract of employment. But, unlike workmen's compensation laws such as exist in the vast majority of states, an unemployment compensation law does not create rights and liabilities between the parties to that relationship but rather, imposes a liability to the state upon those subject to pay contributions, and creates rights against the state in favor of those eligible for benefits.

Assuming the validity of an unemployment compensation law under the state and federal constitutions, there can be no doubt that a state may apply its law to employment entirely within the state, irrespective of the residence of the employee, the situs of the business for which it is performed, or the place where the contract of employment is made.³⁴ Similarly, there can be no doubt that a state may not impose rights and liabilities with respect to employment entirely without the state incidental to a business without the state and performed under a contract of hire made without the state³⁵ irrespective of the residence of the employee,³⁶ or whether or not such employment has a situs in any state. Cases 1 and 8 may therefore be dismissed without further comment.

Cases involving the application of workmen's compensation laws which establish monopolistic state compensation funds to which employers are required to pay assessments and from which compensation is paid by the state in lieu of all direct liabilities between employers and employees, present a precise analogy to situations which may arise under unemployment laws. There are five such reported cases: *Altman v.*

³² If the nature of an unemployment compensation law is held to be a regulation of the act of hiring an employee or a regulation of enterprises in the conduct of which employees are engaged, the place where the contract of hire is made, or the situs of the business for which the services are performed, becomes the significant factor in Cases 7 and 8.

³³ Since the liability to pay compensation for injuries is created by the law, irrespective of its elective or compulsory features, no distinction is made between elective and compulsory workmen's compensation laws. *Smith v. Heine Safety Boiler Co.*, 224 N. Y. 9, 119 N. E. 878 (1918); *Anderson v. Miller Scrap Iron Co.*, 170 Wis. 275, 170 N. W. 275 (1919); Dwan, *Workmen's Compensation and the Conflict of Law* (1927) 11 MINN. L. REV. 329, 333.

³⁴ *Interstate Power Co. v. Industrial Comm.*, *supra* note 28.

³⁵ The principle that the Federal Constitution requires that each state shall confine its legislation to transactions within its borders and that the erroneous extraterritorial application of a state statute involves a denial of constitutional rights under the due process clause is well settled. *N. Y. Life Ins. Co. v. Head*, 234 U. S. 149, 161 (1914); *N. Y. Life Ins. Co. v. Dodge*, 246 U. S. 357 (1918); *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346 (1922).

³⁶ See notes 54 and 55, *infra*.

North Dakota Workmen's Compensation Bureau,³⁷ *Industrial Commission of Ohio v. Gardinio*,³⁸ *Johnson v. Industrial Commission of Ohio*,³⁹ *Hilding v. Washington Department of Labor and Industry*,⁴⁰ and *Murray v. Gerrick and Company*.⁴¹ In each of these cases, the sole test applied by the court was the place of performance of the work. Because in each case the work was performed entirely without the state, compensation was denied in the *Altman*, *Gardinio*, *Johnson*, and *Murray* cases, even though the business for which the work was performed, the residence of the employee, and the place of making the contract of employment, was within the state.⁴² Primarily the decisions construe the laws as not intended to apply to work performed entirely without the state, and therefore throw little light upon the power of the state to require assessments with respect to such work, or to pay compensation for such injuries. Only in the *Gardinio* and *Altman* cases does the court intimate that the state was without power to require assessments from the resident employer with respect to, or to make regulations with respect to, employment localized without the state.⁴³

In the *Hilding* case, the Washington law was held applicable to service without the state, incidental to or a part of the course of service localized within the state. Dicta in the *Gardinio* and *Altman* cases approve a similar application of the Ohio and North Dakota laws.⁴⁴

The *Altman*, *Gardinio*, *Johnson* and *Murray* cases involved facts of the type

³⁷ 50 N. D. 215, 195 N. W. 287, 28 A. L. R. 1337 (1923). Contract of employment made in North Dakota, with an employee, resident therein, by an employer, who conducted business operations in that state as well as several other states, to do work solely in the state of Washington, where the employee sustained injury. Compensation denied.

³⁸ 119 Ohio St. 539, 164 N. E. 758 (1929). Contract of employment made in Ohio with an employee, resident therein, by an Ohio corporation to do work solely in another state, where the employee sustained injury. Compensation denied.

³⁹ 45 Ohio App. 125, 186 N. E. 509 (1932). Same facts as in *Gardinio* case, plus the additional factor that the contract of employment provided that it was to be governed by the law of the place of performance. Compensation denied.

⁴⁰ 162 Wash. 168, 298 Pac. 321 (1931). Contract of employment made in the state with an employee, resident therein, by an employer whose business was conducted within the state to do work in the state. In the course of such work employee sustained injury while temporarily driving through another state. Compensation awarded.

⁴¹ 172 Wash. 365, 20 P. (2d) 591 (1933), *aff'd on other grounds*, 291 U. S. 315 (1934). Contract of employment made in the state with an employee, resident therein, by an employer doing business both within and without the state, to do work entirely without the state, payment however to be for each hour from the time the employee left his home in the state in the morning until his return in the evening. Compensation denied.

⁴² Both the Ohio and North Dakota Workmen's Compensation Acts, under which the *Altman*, *Gardinio*, and *Johnson* cases were decided, contained a specific provision that compensation should be payable to every injured employee, "wheresoever such injury has occurred."

⁴³ The court in the *Altman* case said: "We do not believe that the Legislature intended to require local industries to carry hazards of occupations or employments, the situs of which is in a foreign jurisdiction and beyond the borders of the state, and not merely incidental to a business or occupation within the state, and which cannot, as a matter of law, be required to, and do not in fact, contribute to the compensation fund in the form of a premium collected from the proprietor of the business or industry." 50 N. D. at 225, 195 N. W. at 291.

⁴⁴ The Ohio Workmen's Compensation Act is apparently being administered in accordance with this dicta. See *Finkley v. Saenger Tailoring Shop*, *supra* note 28.

noted in Case 2. On the other hand, several states whose workmen's compensation laws do not establish monopolistic insurance funds from which the state pays compensation, but who regulate the rights and liabilities between employers and employees, requiring employers to carry insurance with private or public insurance carriers, have held their laws applicable to the same facts,⁴⁵ and to factual situations of the type noted in Cases 3,⁴⁶ 4,⁴⁷ 5,⁴⁸ and 6.⁴⁹

The great weight of opinion under the various state workmen's compensation laws sustains their application to services rendered without the state which are incidental to, or a part of the course of, employment localized within the state. The valid application of state unemployment compensation laws to factual situations of the type noted in Case 7 therefore seems clear.⁵⁰ Conversely, although a state may apply its law to employment within the state which is incidental to or a part of the course

⁴⁵ Alaska Packers Ass'n v. Industrial Acc. Comm., 1 Cal. (2d) 250, 34 P. (2d) 716 (1934), *aff'd*, 294 U. S. 532 (1935); Hulswit v. Escanaba Mfg. Co., 218 Mich. 331, 188 N. W. 411 (1922); Smith v. Van Noy Interstate Co. 150 Tenn. 25, 262 S. W. 1048 (1924). (Contracts made within the state. No cases found in which the law of a state was held applicable to this type of factual situation in which the contract was made without the state.)

⁴⁶ Beall Bros. Supply Co. v. Industrial Comm., 341 Ill. 193, 173 N. E. 64 (1930) (Contract made within the state. No cases found in which the law of a state was held applicable to this type of factual situation in which the contract was made without the state.)

⁴⁷ McKesson-Fuller-Morrisson Co. v. Industrial Commission, 212 Wis. 507, 250 N. W. 396 (1933); Smith v. Heine Safety Boiler Co., 119 Me. 552, 112 Atl. 516 (1921); Ocean Acc. & Guar. Corp. v. Industrial Comm. 32 Ariz. 235, 257 Pac. 644 (1927).

⁴⁸ State *ex rel.* Chambers v. District Court, 139 Minn. 205, 166 N. W. 185 (1918); Kennerson v. Thames Tow Boat Co., 89 Conn. 367, 94 Atl. 372 (1915); Tallman v. Colonial Air Transport, Inc., 259 N. Y. 512, 182 N. E. 159 (1932). (Contracts made in the state.) Ginsberg v. Byers, 171 Minn. 366, 214 N. W. 55 (1927). (Contract made without the state.)

⁴⁹ Interstate Power Co. v. Industrial Commission, *supra* note 28.

⁵⁰ The District of Columbia and eight state unemployment compensation laws enacted prior to Feb. 1, 1936 provide for the coverage of such employment by provisions under which employment "all or the greater part" of which is performed within the state, is subject to the law. The New Hampshire, Washington, Oregon, Alabama, and Massachusetts laws are limited to cases in which the greater part of the employment is "customarily" performed within the state, but do not indicate the period, on the basis of which the place where the greater part of the employment is rendered, is to be determined. Presumably, such periods are to be prescribed by the agency administering the law. The Wisconsin and California laws prescribe a week as the determining period, the former applying only to employment during any week in which all or the greater part of the person's hours of work are performed within the state, and the latter applying only to employment during any week in which all or the greater part of the work is "customarily" performed within the state. The New Hampshire, Washington, Alabama and Massachusetts laws specifically purport to cover incidental employment without the state by providing that "such employment" (*i.e.*, all or the greater part of which is performed within the state) shall include the person's entire employment, but apparently the same result is intended under the other laws which do not include such a provision. The difficulty inherent in the "all or greater part" test, particularly in a law such as Wisconsin's, is that weeks in which the employee is sent without the state for four or more days, upon temporary work in the course of his local employment, are exempted from the application of the law. A probable additional reason for the "all or greater part" test is the desire to avoid duplication of coverage, but that end will be accomplished only if those states, whose laws are limited to such employment when it is "customarily" so performed within the state, adopt substantially uniform standards for determining such customary employment. The New York law, on the other hand, will tend to defeat efforts to avoid duplication of coverage because it purports to cover employment in which either all or the greater part of the work is to be performed within the state or the contract of employment is entered into, and the work is in any part to be performed, within the state. The Utah law apparently adopts the test of the workmen's compensation laws; it is applicable to "any employment" by an employer.

of employment localized without the state⁵¹ (Case 7) and may find sufficient elements in the case upon the basis of which it might cover the *entire* employment both within and without the state, states seeking to avoid duplication of coverage will probably refrain from applying their laws to either the employment within the state or the entire employment.⁵²

Ultimately, the power of the state to require contributions with respect to the types of factual situations noted in Cases 2, 3, 4 and 5 is dependent upon the question of fact whether there are, in such cases, things done within the state of which the state may properly lay hold as the basis of the regulation imposed, and the test applied by the Supreme Court under the due process clause of the Fourteenth Amendment is the reasonableness of such things as the basis for the regulation involved.⁵³

Residence of the employee, without more, appears clearly unreasonable;⁵⁴ moreover, the privileges and immunities clause and the equal protection clause of the Federal Constitution would seem to preclude a state from confining the extraterritorial application of its law to residents of the state.⁵⁵ But residence of the employee, when accompanied by other bases for regulation, may be a factor in support of the reasonableness of the application of the state law.⁵⁶

Prima facie, an unemployment compensation law appears to be a regulation of

⁵¹ *Interstate Power Co. v. Industrial Comm.*, *supra* note 28; *Am. Radiator Co. v. Rogge*, 86 N. J. L. 436, 92 Atl. 85, 94 Atl. 85 (1914).

⁵² Several state courts have denied the application of their state workmen's compensation laws under such facts, even though the injury occurred within their borders. *Proper v. Polley*, 259 N. Y. 516, 182 N. E. 161 (1932); *Norman v. Hartman Furniture Co.*, 84 Ind. App. 173, 150 N. E. 416 (1926).

⁵³ *Alaska Packers Ass'n v. Industrial Acc. Comm.*, 294 U. S. 532 (1935); Note, *A Factual Approach to the Constitutional Aspects of the Conflict of Laws, the Alaska Packers Case* (1935) 35 *Col. L. Rev.* 751. See dissents in *N. Y. Life Ins. Co. v. Dodge*, *supra* note 35, and *Compania General v. Collector*, 275 U. S. 87, 99 (1927). In the *Alaska Packers* case, the Court overruled the contention that it violated the due process clause of the Fourteenth Amendment, to apply the California Workmen's Compensation Act to an injury sustained in Alaska by an employee hired under a contract of employment made in California to work exclusively in Alaska. However, too much reliance should not be placed upon that case, both because of the peculiar circumstances involved and because the Court apparently regarded the California Act as a regulation of the rights and liabilities between the parties to the contract of employment made within the state, under the familiar rule that the laws of the place where a contract is made enter into and form a part of that contract, as fully as if they had been expressly referred to or incorporated in its terms. *Citizens Savings Bank v. Owensboro*, 173 U. S. 636, 644 (1899); *Farmers Bank v. Fed. Res. Bank*, 262 U. S. 649, 660 (1923). The Court said, at p. 540: "But where the contract is entered into within the state, even though it is to be performed elsewhere, its terms, its obligations, and its sanctions are subject, in some measure, to the legislative control of the state. The fact that the contract is to be performed elsewhere does not of itself put these incidents beyond reach of the power which a state may constitutionally exercise."

⁵⁴ *N. Y. Life Ins. Co. v. Dodge*, *supra* note 35; *Home Ins. Co. v. Dick* 281 U. S. 381, 397 (1930). No cases have been found which apply a state workmen's compensation law solely on the basis of the residence of the employee, although several mention it in passing.

⁵⁵ *Quong Ham Wah v. Industrial Acc. Comm.*, 184 Cal. 26, 192 Pac. 1021 (1920), *writ of error denied*, 255 U. S. 445 (1921); *Truax v. Raich*, 239 U. S. 33 (1915).

⁵⁶ *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145 (1932); *Val Blatz Brewing Co. v. Industrial Comm.*, *supra* note 31; *Esau v. Smith Bros.*, 124 Neb. 217, 221, 246 N. W. 230, 232 (1933). *Cf.* *Equitable Life Ins. Co. v. Pa.*, 238 U. S. 143 (1915); *Provident Svgs. Ass'n v. Kentucky*, 239 U. S. 103 (1915); *Compania General v. Collector*, 275 U. S. at 98.

an employer-employee relationship. If such is the nature of the regulation, the logical test of the coverage of a state law is the place of performance of the work, irrespective of the situs of the business for which it is performed, of the residence of the employee and of the place where the contract of employment is made.⁵⁷ Such a test will exclude from the application of a state law the factual situations noted in Cases 2⁵⁸ and 3,⁵⁹ will permit the application of the state law to the services performed within the state in the factual situations noted in Cases 4, 5, 6 and 7,⁶⁰ and to the entire services performed both within and without the state in Case 7,⁶¹ but will exclude from the application of the state law the services performed without the state in Cases 4, 5, and 6.⁶²

On the other hand, an unemployment compensation law might with propriety be regarded as a law attaching rights and liabilities to the act of hiring an employee,⁶³ or a law attaching rights and liabilities to the conduct of an enterprise in which employees are engaged,⁶⁴ the extent of the rights and liabilities in each case being measured by the wages paid for, and the duration of, the services rendered.⁶⁵ If the law is regarded as a regulation of the act of hiring an employee, the test of the application of the law should be the place where the contract of employment is made; if it is regarded as a regulation of the conduct of an enterprise in which employees are engaged, the test should be the situs of the business for which the services are performed; each test will determine the coverage or the exclusion from coverage of

⁵⁷ Cf. Note (1933) 10 N. Y. U. L. Q. REV. 518, 522, 523.

⁵⁸ *Altman v. N. D. Workmen's Comp. Bureau*, *supra* note 37; *Industrial Comm. v. Gardinio*, *supra* note 38. Cf. *Cameron v. Ellis Construction Co.*, 252 N. Y. 394, 169 N. E. 622 (1930).

⁵⁹ *Wandersee v. Moskewitz*, 198 Wis. 345, 223 N. W. 837 (1929); *Baggs v. Standard Oil Co.*, 180 N. Y. Supp. 560 (1920).

⁶⁰ *Smith v. Heine Safety Boiler Co.*, 119 Me. 552, 112 Atl. 516 (1921) (Case 4); *Tallman v. Colonial Air Transport*, *supra* note 48 (Case 5); *Hagenbeck v. Randall*, 75 Ind. App. 417, 126 N. E. 501 (1920).

⁶¹ *Smith v. Aerovane Utilities Corp.*, 259 N. Y. 126, 181 N. E. 72 (1932); *Anderson v. Miller Scrap Iron Co.*, *supra* note 33.

⁶² *Norman v. Hartman Furniture Co.*, *supra* note 52.

⁶³ *Alaska Packers Ass'n v. Industrial Acc. Comm.*, *supra* note 53; *Beall Bros. Supply Co. v. Industrial Comm.*, *supra* note 46.

⁶⁴ *Penwell v. Anderson*, 125 Neb. 449, 250 N. W. 665 (1933) and cases there cited; *Brameld v. Dickinson Co.*, 186 Minn. 89, 242 N. W. 465 (1932), *Ginsburg v. Byers*, 171 Minn. 366, 214 N. W. 55 (1927); *Durrett v. Eicher-Woodland Lbr. Co.*, 19 La. App. 504, 140 So. 867 (1932). In the *Penwell* case, the Court said (250 N. W. at 666) that "the law was enacted for the purpose of requiring industry to bear a part of the burden occasioned by accidental injuries to the workmen engaged therein when such injuries arise out of and in the course of the employment" and that "In determining whether the Compensation Act is applicable to a particular case, it is of prime importance to determine the location of the industry. If the industry in which the workman is employed is located in this state, he is, ordinarily, entitled to the protection of the Nebraska Compensation Law, and this applies even though his injury may occur in another state, if the work that he was doing was a part of the industry being carried on in this state and was incident thereto. Domicile of the employer or employee or the place where the contract was entered into are not, in themselves, controlling, although those factors may be circumstances in aid in ascertaining whether the industry is located within the state." This might, with equal appropriateness, have been said with respect to an unemployment compensation law.

⁶⁵ Cf. *Equitable Life Ins. Co. v. Penna.*, *supra* note 56, and *Compania General v. Collector*, *supra* note 53, sustaining the power of a state to measure regulatory exactions by amounts paid under contracts which such state had no power to prevent or regulate.

the types of factual situations noted and the materiality of the things done within the state which the state might have properly regarded as a basis for its regulation.

The coverage of the migratory worker with disconnected periods of employment in several states, in addition to the type of problem heretofore discussed, involves problems connected with the payment of benefits. The maintenance of an unemployment compensation system as a plan for compensating involuntary unemployment requires not only that a recipient of benefits accept suitable work when it is offered to him, but also that such recipient of benefits report periodically to establish his continued unemployment and to collect his benefits.⁶⁶ Assuming that a migratory worker with disconnected periods of employment in several states accumulates potential rights to benefits in each state in which he has been employed, upon becoming unemployed and eligible for benefits such a worker would be required to move from state to state in order to report his unemployment and collect the benefits payable in each state. The necessity for some arrangement whereby such an individual might collect benefits in a single state, based upon his employment in all the states in which he has accumulated rights thereto, is apparent.

Such an arrangement involves serious difficulties. Should the law of each state in which employment has been performed apply with respect to the benefits based upon such employment, or should the law of the state in which benefits are being paid apply exclusively, irrespective of its differences from the laws of the states where the rights to benefits were accumulated? Assuming that the laws of the states where the employment has been rendered provide for merit ratings, whereby an employer's rate of contribution may be increased or decreased in accordance with the relation between his paid contributions and the benefits charged against his account, are employers whose records are to be charged with benefits paid in another state to be given an opportunity to be heard upon, or to dispute, claims which they contend should not be allowed, and if so, how is such hearing to be provided?⁶⁷ In order to maintain the solvency of the unemployment compensation fund of the state which pays such benefits, how is that state to be reimbursed for benefits based upon employment in other states? There are other difficulties which must be solved, but the foregoing illustrate the more obvious questions.

Several state laws contain provisions whereby such arrangements may be made

⁶⁶ Under the Social Security Act, §§303 (a) (2) and 903 (a) (1), one of the conditions upon which a state may receive grants in aid of the administration of its law, and upon which employers subject thereto may secure credit against the federal tax, is that the state law require all compensation to be paid through public employment offices in the state or such other agencies as the Social Security Board may approve.

⁶⁷ Unemployment compensation laws generally either provide for a limited disqualification period for, or for a total disqualification of, otherwise eligible individuals who have voluntarily left their employment or have been discharged for misconduct. Unless, at the time that a migratory worker leaves a particular employer in the state, the proper state agency determines whether or not he was discharged for misconduct or such leaving was voluntary, the question will not be raised by the employer until the worker applies for benefits based upon such employment.

through reciprocal agreements between states.⁶⁸ Reciprocal legislation, providing for the payment of benefits to migratory workers, based upon employment in other states and conditioned upon like treatment by such other states of individuals entitled to potential benefits under the law of the first state is a possible method of solving the problem.⁶⁹ It has also been urged that the federal government, through the machinery made available in the operation of the Unemployment Trust Fund,⁷⁰ serve as a clearing agency for the reimbursement of states who pay unemployment compensation based upon employment in other states.

The problem is now a subject of study and discussion among the various states having or contemplating the enactment of unemployment compensation laws. Its solution by an administratively practical plan will probably require much of the experimentation that is characteristic of the development of our legislation and administrative procedures in the field of social legislation.

⁶⁸ See, e.g., the laws of the District of Columbia, Alabama, New Hampshire and Washington. Such reciprocal agreements will probably require the consent of Congress under Article I, Section 10, of the Federal Constitution. See Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments* (1925) 34 YALE L. J. 685; Donovan, *State Compacts as a Method of Settling Common Problems of Several States* (1931) 80 U. OF PA. L. REV. 5; Note (1935) 35 COL. L. REV. 76.

⁶⁹ The scheme of reciprocal legislation has been frequently adopted in tax statutes. See, e.g., WASH. REV. STAT. ANN. (Remington, 1932) §11203-1. See also *Kane v. New Jersey*, 242 U. S. 160, 167-168 (1916).

⁷⁰ Under the Social Security Act, §§303 (a) (4), 903 (a) (3), another of the conditions upon which the grants in aid and credits, mentioned in note 66, may be allowed is that the state law require all contributions paid to the state to be deposited in the Unemployment Trust Fund, maintained in the United States Treasury pursuant to §904 of the Act. It is contemplated that from that fund, the depositing states will make necessary requisitions for the payment of benefits, to the extent, of course, of their deposits therein.